Materials:

- Problems and other materials attached to the Syllabus.
- Selected provisions of the U.S. Constitution, Statutes, and Rules (distribution).

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1 There are a few more scheduled classes than the total number of assignments, and in any event, we will generally not cover exactly one assignment per class. The best preparation advice I can give is to stay one full assignment ahead of where we ended the last class. At the first class, I will explain the assignments in connection with the Problems attached to the syllabus.

I will be unable to meet the class on the last scheduled day of the semester (Tuesday, April 25), and so I have tentatively scheduled a makeup for Tuesday, February 22d, during the available make-up period. (That Tuesday is a “legislative Monday,” so the class would not ordinarily have met on that day.)

Please sign up on the seating chart at the first class. If you then decide to drop the course, let me know and I’ll remove your name. Many thanks.

2 Assignments to the casebook will be designated as H&W ____, and to the Supplement as Supp. ____. (Not all the materials in the supplement that bear on assigned portions of the casebook are specifically assigned – only those likely to be relevant to our discussion.)
ASSIGNMENTS - Federal Courts - Spring 2005

I. Marbury and the Nature of the Judicial Function

1. H&W 55-73 (*please read for first class*).

II. Congressional Control of the Distribution of Judicial Power

2. H&W 319-37. 345-46 (top) (Para D(1) only).

3. H&W 337-52 (through Para. (2)), 357 (Section E)-61, 375-77 (Para. (7)(c) on Mendoza-Lopez); Problems A, B.

4. H&W 25-28 (Federalist No. 82), 418-43.

5. H&W 443-65; Problem C.

III. Federal Review of State Court Decisions

A. Direct Supreme Court Review

6. H&W 466-94.

7. H&W 494-517; Supp. 23 (addition to p. 517); Problem D.

8. H&W 541-59, 564-65; Supp. 25-26 (addition to p. 564-65); Problem E.

B. Collateral Review on Federal Habeas Corpus


10. H&W 73-75 (to end of last full para.); 1325-53; Supp. 78-80 (additions to pp. 1332-33, 1335, 1350, 1352-53); Problem F.

11. H&W 1358-84; Supp. 82-83 (addition to pp. 1376-77).

IV. Habeas Corpus for Persons in Federal Custody – Herein of The Suspension Clause

12. H&W 1289-93, 407-16 (top); Supp. 56-77 (top); Problem G.

V. Federal Common Law

13. H&W 630-36 (top), 685-86, 690-98; Problem H.
14. H&W 494-95 (review), 698-721 (through Para. (5)).

15. H&W 723-29, 730 (Intro. Note), 743-58 (top); Supp. 29-33 (additions to pp. 753, 758).

16. H&W 793-825; Problem I.

VI. Federal Question Jurisdiction

17. [Background: H&W 826-31] H&W 416-18, 832-55; Supp. 36 (addition to p. 847); Problem J.

18. H&W 856-62, 521-23 (Para (3(c)), 863-86; Problem K.

VII. Suits Challenging Government (Primarily State Government) Action

19. H&W 944-47 (through Para. (3)), 950-57 (top), 973-87 (top).

20. H&W 957-60, 987-1000; Problem L.

21. H&W 1004-39; Supp. 41-44 (additions to pp. 1032, 1033); Problem M.

22. H&W 1039-66; Supp. 45-47 (additions to pp. 1060, 1064-65); Problem N.

23. H&W 1067-84.

24. H&W 1084-98, 1123-27 (Paras (3)-(6)); Supp. 49-50 (addition to p. 1092); Problems O, P. (In connection with Problem P, see p. 1026, n. 3.)

VIII. Judicial Federalism: Limitations on District Court Jurisdiction or its Exercise

Lecture: Statutory Limits (read H&W 1142-44); Exhaustion of State Administrative Remedies; “Pullman” and Other Forms of Abstention (read H&W 1179-88).


26. H&W 1229-51; Problem Q.
Dr. Jane Bennett was a physician on the staff of the Ames City Municipal Hospital, a hospital owned and operated by Ames City in the State of Ames. Dr. Bennett also maintained a small private practice of her own, during the time that she was not required to be at the hospital.

Approximately a year ago, Dr. Bennett, while pursuing her private practice on her own time, performed an abortion on a young woman, aged 17, even though the woman stated that she had not notified both of her parents in advance. (Ames law requires such notification to both parents – provided certain conditions exist – and makes it a felony for a physician to perform an abortion on a patient with knowledge that the requirement is applicable and has not been complied with. Dr. Bennett performed the abortion because the young woman advised her that she was living alone and had not had close relations with her parents for several years. Moreover, Dr. Bennett concluded that, for medical reasons, there was a clear need to perform the abortion as soon as possible.)

When hospital officials found out about these events, they determined, after notice and hearing, to remove Dr. Bennett from the staff, and to sever her relationship with the hospital. They relied on a state law that prohibits any state or local agency from employing any person found by the employing agency to have committed a crime punishable as a felony.

Dr. Bennett consulted a lawyer who decided to file a federal court suit against the relevant hospital officials seeking (1) an order compelling the officials to restore her to the hospital staff, and (2) damages for lost earnings in the interim. (The suit was to be based on a claim that the state statutory restriction was an unconstitutional infringement of a woman's right to an abortion, and on the recognized standing of a physician to assert that right in this context.) Before the suit could be filed, assume that Congress enacted a new provision to be added to Title 28 of the U.S. Code. The provision, which is stated to be applicable to all cases pending on, or filed after, its effective date, reads as follows:

Section 1370. Withdrawal of Jurisdiction in Certain Cases.

Notwithstanding any other provision of this Title, no court of the United States shall have jurisdiction of any case arising out of, or relating to, any state statute, ordinance, rule, or regulation, or any part thereof, which deals with the subject of abortion.

As a result of the statute, Dr. Bennett's lawyer decided to file the suit in state court, seeking relief under 42 U.S.C. § 1983. The highest state court has now denied the requested relief on the merits, and the Supreme Court has granted Dr. Bennett's petition for certiorari. Does the Supreme Court have jurisdiction to review the state court judgment?
PROBLEM B

Assume that Congress, in an Act passed in late 2002, delegated to the Department of Health and Human Services (HHS) authority to promulgate regulations designed to limit the ability of doctors who participate in Medicare and Medicaid to perform abortions for any patient. Violations of the HHS regulations were to be subject to the imposition of criminal fines of up to $10,000. In early May 2003, HHS promulgated a regulation providing that doctors who agree to participate in the federal programs may not perform abortions on a patient under 18 unless they have made reasonable efforts to notify the patient's parents.

In May 2004, the United States filed a criminal complaint in a federal district court charging Dr. Ernest Watkins with a violation of the regulation in an abortion performed in January of that year. Dr. Watkins (who participates in both Medicaid and Medicare) filed a motion to dismiss the criminal complaint on the grounds that the regulation he was charged with violating was (i) beyond HHS authority and inconsistent with congressional intent, and (ii) an unconstitutional invasion of the 5th Amendment rights of doctors and patients alike. However, another provision of the same 2002 legislation stated that all questions regarding the legality or constitutionality of any regulation promulgated by HHS under the Act could be raised only in a petition for judicial review of the regulation filed in the Federal Circuit (in Washington, D.C.) within one month of the regulation's effective date.

In connection with the regulation involved in Dr. Watkins' case, one such petition was filed by a group of doctors in Washington, D.C. in late May 2003, but was voluntarily withdrawn one week later. The Government takes the position that the only issue open to the federal district court is whether Watkins' conduct violated the regulation and that the court has no jurisdiction to entertain the challenges raised in the motion to dismiss.

Is the Government's contention correct?

Consider the bearing on this question of the Yakus and Lopez-Mendoza cases.

PROBLEM C

The Federal Employers Liability Act (FELA), enacted in 1908, provides a federal cause of action for personal injuries suffered by railroad workers working in interstate commerce whose injuries are caused by the negligence of their employers. The Act abrogated the "fellow servant" rule, which operated in a number of states to bar recovery by most employees who were injured on the job because the injury was likely to have been caused by the fault of a fellow employee.

Today, most workplace injuries are covered by workers compensation systems, but the FELA survives as a pocket of tort liability -- one the workers and their unions are eager to retain because it generally permits far larger recoveries than under workers compensation systems.
The federal and state courts have concurrent jurisdiction over FELA actions, but a special provision (28 U.S.C. § 1445) prohibits removal of a state court FELA action to a federal court -- removal that would otherwise be authorized under 28 U.S.C. § 1441. (In the questions that follow, assume that there is sufficient involvement with interstate commerce to bring the FELA into play.)

1. Suppose that Congress, concerned about congestion in the federal courts, decides to eliminate their jurisdiction in FELA cases and to provide that an injured railroad employee may bring an action against his employer "in any state court having personal jurisdiction over the defendant." Williams, a citizen of the state of Ames, is injured in Ames while working for his employer, the Pottsville Railroad. Worried that congestion in the Ames courts might keep the case from coming to trial for many years, Williams brings an FELA action against his employer in a state court in the state of Langdell. The railroad, an Ames corporation with its headquarters in that state, is served at its Langdell office in accordance with Langdell law. Langdell has a judicially declared rule of forum non conveniens similar to that in the New York statute described in the Douglas case (H&W 449). Following that rule, and rejecting Williams' argument that it is required by federal law to take the case, the trial court dismisses the action, and the Langdell Supreme Court affirms. The U.S. Supreme Court grants Williams' petition for certiorari. How should the case be decided?

2. Assume that the statute in part (1) of this problem has not been passed, and that the present FELA is still in force. Ringler, a citizen of Ames, is injured in Ames while working for the Toonerville Railroad. She brings suit in Ames state court, seeking $1000 in damages. Ames has recently passed a statute withdrawing jurisdiction from its courts in torts cases in which the amount in controversy is less than $2000. The statute provides instead for compulsory arbitration, with any arbitral award subject to enforcement (or challenge on limited grounds) in a judicial proceeding.

The railroad moves to dismiss Ringler's action, contending that her only remedy lies in an arbitration proceeding. The state courts, agreeing with that contention, dismiss the action, and the U.S. Supreme Court grants Ringler's petition for certiorari. How should the case be decided?

PROBLEM D

In Chapman v. California, 386 U.S. 18 (1967), the U.S. Supreme Court laid down a federal standard for determining whether a federal constitutional error in a state criminal proceeding was "harmless," and also stated that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error." In Sandstrom v. Montana, 442 U.S. 510 (1979), the Court held that the due process clause was violated, in a criminal prosecution for "purposely or knowingly" causing the death of another, by a jury instruction that a person "intends the ordinary consequences of his voluntary acts" (the instruction was held equivalent to a "conclusive presumption" on the issue of intent). The Court expressly left open the question whether, if a jury is so instructed, the error can ever be harmless.
Following these decisions, the highest court of the State of Ames, on appeal of a criminal conviction, held that a trial court had violated the Sandstrom rule in its instruction to the jury. The state court then turned to the prosecution's argument that any such error was "harmless" and said:

We very much doubt on this record that the error was harmless under the Chapman standard or the standard laid down in our own decisions. But we need not resolve that question because we are satisfied that a Sandstrom error cannot be harmless except in rare circumstances, and this is not one of them. To weigh the evidence of guilt in such a case would be to invade the jury's function, and this we decline to do. The truthfinding function belongs to the jury in this state and not to the court. Accordingly, the judgment of conviction is reversed.

Assume that the prosecution does not challenge the state court's conclusion that the trial judge's charge violated the Sandstrom rule but does seek U.S. Supreme Court review of the state court's disposition of the harmless error question. Does the Court have jurisdiction under 28 U.S.C. § 1257?

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PROBLEM E

Zenobia Fenster, a projectionist at the Place Pigalle Adult Theatre in Atlanta, Georgia, was tried and convicted on two counts of distributing obscene materials. She received a fine of $5,000 and a jail sentence of one year, but was allowed immediate probation on condition that she pay the fine at the rate of $500 per month. When she failed to make the first payment, the state moved for revocation of probation. At the hearing, Fenster renewed the argument she had made at trial that the material claimed to be obscene was protected by the First Amendment. She also argued that because she lacked the financial ability to pay the fine, it was inappropriate to revoke her probation for failure to pay. (The argument of inability to pay had not been made at the initial sentencing.) The trial judge adhered to his prior ruling that the material was not protected by the First Amendment and held that, although he was satisfied of Fenster's inability to pay, the point had been waived by failure to raise it at the initial sentencing. Probation was revoked.

Fenster then appealed to the state intermediate appellate court solely on the First Amendment issue, and that court affirmed the trial judge's decision. She then sought discretionary review, in the state supreme court, on both issues (the First Amendment question and the inability to pay question), and that court, in a brief per curiam opinion issued without oral argument, said: "We have reviewed the papers in this case and affirm the lower court holding on the First Amendment claim. As to the claim based on Fenster's inability to pay, we recognize our discretion to consider the claim despite Fenster's failure to preserve it in accordance with state rules. But we see no reason not to hold Fenster to the requirement that any objection to a fine is waived unless it is raised at the time the fine is imposed -- especially since no objection to the fine was raised in the intermediate appellate court."
Fenster then sought and obtained a writ of certiorari in the Supreme Court on the First Amendment issue. But in her brief on the merits, she argued not only that the conviction should be reversed on First Amendment grounds but also that the revocation of her probation was a denial of equal protection under the Fourteenth Amendment in view of her admitted inability to pay the fine, even in installments. The state, as respondent, argues that the Court may not and in any event should not consider the latter argument. Is the respondent correct on either or both of these points?

PROBLEM F

David Denton, a physician in an abortion clinic in the state of Ames, was prosecuted for having provided an abortion to Casey Webster, a woman in her 28th week of pregnancy, in violation of Ames' ban on "partial birth abortions"--a ban that reads in relevant part as follows:

Section 123. Partial Birth Abortions: No person shall knowingly perform or attempt to perform a partial birth abortion upon a pregnant woman unless that procedure is necessary to save the life of the mother. For purposes of this statute a “partial birth abortion” is defined as any procedure in which the doctor or other person performing the abortion partially delivers vaginally a living unborn child before killing the . . . child.

Violation of the law is made a felony, punishable by up to 10 years in prison.

On May 16, 1999, Denton was convicted of violating § 123, and was sentenced to eight years in prison. His conviction was affirmed by the intermediate appellate court, and, on April 5, 2000, by the Ames Supreme Court. No petition for certiorari was filed in the U.S. Supreme Court within the ninety day period permitted by law, or at any time thereafter. Having been on bail from the time he was charged through the end of his appeals, Denton began to serve his sentence on May 1, 2000.

Assume the following: Dr. Denton had performed the abortion in a situation in which there was no threat to the mother’s life or health, and using a certain procedure (called here “Procedure A”), which he conceded was covered by the language of Section 123. But he argued at every stage in the state proceedings that § 123 was unconstitutionally overbroad because (a) it contained no exception for abortions required to protect the health of the mother, and (b) even if the statute could constitutionally be applied to “Procedure A” it also covered another procedure (“Procedure B”) and could not constitutionally be applied to that procedure. At every stage, the state courts viewed the statute as fully constitutional in all of its applications. On June 28, 2000, the United States Supreme Court ruled, in Stenberg v. Carhart, a case from a different state involving an action by a physician for declaratory and injunctive relief and in which certiorari had been granted on January 14, 2000, that a criminal statute worded identically to Ames § 123

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3 As indicated by the dates in this problem, it arose before the enactment of the federal prohibition on partial birth abortion, and so the impact of that legislation, if any, should not be considered. (Note: The constitutionality of that legislation has yet to be considered by the Supreme Court.)
was unconstitutionally overbroad. The reasons were essentially the same as those argued by Denton in the Ames state courts. The Court recognized in its decision that none of its prior decisions directly controlled the case before it.

In August 2000, Dr. Denton seeks to challenge his conviction by bringing a petition for federal habeas corpus against the warden in charge of the institution where he is serving his sentence. What are the issues raised by this petition, and how should those issues be resolved?

PROBLEM G

Assume that shortly after the 2004 Supreme Court trilogy covered in this assignment, Congress enacts what it describes as a “clarifying amendment” to 28 U.S.C. § 2241(a), which reads as follows:

“Add the following sentence at the end of 28 U.S.C. § 2241(a):
‘No court or judge shall have jurisdiction, within the meaning of this section, to grant a writ of habeas corpus to any petitioner who, at the time of seeking the writ, is in custody outside the territorial limits of the United States as a result of any alleged involvement in terrorist activities directed at the United States or any officer, employee, or citizen of the United States.’”

Before enactment of this amendment, two individuals, Brian Ferguson (an American civilian) and Omar Rashid (an Afghan citizen) had been taken into custody in Afghanistan by American troops and confined in special quarters at a military post near Kabul. According to a news release issued by the US Army, both men were being held for questioning in connection with the kidnaping and threatened execution of an American citizen-journalist (who is apparently being held by Taliban loyalists).

The ACLU has been asked by relatives of the prisoners to assist in obtaining any available relief in an American court. Attorneys for the ACLU have been unable to meet with the prisoners themselves but based on statements by the relatives, they believe that Ferguson and Rashid have been held in custody without charges, and without access to an attorney, for one year, that they have been permitted to see family members only twice for short times during that entire period, that they have been regularly interrogated by Army interrogators throughout the period, and that the interrogations have been conducted under conditions of severe deprivation, including lack of food, water, and opportunity for sleep or rest, and that neither prisoner has any knowledge of, or involvement in, the kidnaping of any American journalist or any other American citizen.

You are a young attorney in the ACLU and you have been asked to prepare for and attend a meeting at which the issue to be discussed is whether the ACLU can get an American court to look at the substance of these allegations and to hold an evidentiary hearing in which the allegations can be proved and some form of relief obtained.
In particular, the focus of the discussion will be: (a) Can a habeas action be brought in a federal court, notwithstanding the amendment? If so, where should it be filed, and against whom? (b) If a federal habeas action can’t be filed, is there some other available action that can be filed in some court? If so, what form would it take and where and against whom should it be brought?4

PROBLEM H

The *Erie* decision purports to rest on constitutional grounds. How would you state the constitutional holding of *Erie* -- what is it that makes the approach of the lower courts in that case unconstitutional?

More generally, what are the constitutional limits on the power of the federal courts to formulate federal common law? Are any additional limits imposed by the Rules of Decision Act, 28 U.S.C. § 1652? Is *Clearfield* consistent with *Erie*?

PROBLEM I

Two days after Sally Forthright began work at the federal Office of Management and Budget (as a budget examiner dealing with Department of Justice budgets), she stated on television that the country would be better served if the Attorney General were to resign. One week thereafter -- while she was still a probationary employee -- her supervisor informed her that she lacked the facility with budgets necessary for the job, and that her employment was being terminated.

The Civil Service Reform Act of 1978 (the same statute at issue in *Bush v. Lucas*) clearly does not extend to probationary employees like Forthright the set of remedies -- including the right to advance written notice of proposed adverse action, a right to bring an administrative appeal, and finally, in the event the administrative appeal is unsuccessful, a right to judicial review in federal court -- generally available to nonprobationary federal employees. (Certain nonprobationary employees, and job applicants, also lack those protections.) Instead, under the statute a probationary federal employee has only the right to petition the Office of Special Counsel of the Merit Systems Protection Board (MSPB) to investigate her case and to present it to the MSPB. (The Office is concerned not only with remedying violations of law, but with handling all the regulatory problems that attend a civil service system. In recent years, critics have asserted that the Office is badly underfunded, and that rather than protecting

4In connection with part (b), consider, among other possibilities, the “Alien Tort Statute” (28 U.S.C. § 1350); the Federal Tort Claims Act (see 28 U.S.C. §§ 1346(b)(1) and 2674, and the exemptions thereto, especially § 2680 (j) and (k), as well as the exemption from individual liability in § 2679(b)(1)); and the Torture Victim Protection Act, H&W pp. 756-57.
whistleblowers, it protects management from whistleblowers.) The Special Counsel is obliged, upon concluding that reasonable grounds exist to believe that a prohibited personnel practice has taken place, to report that conclusion to the MSPB and the federal Office of Personnel Management. Any further action by the MSPB or OPM is wholly discretionary.

Forthright petitioned the Office of Special Counsel, claiming that her discharge was in retaliation for her criticism of the Attorney General. If that claim is correct, her discharge would violate the Civil Service regulations. The Office of Special Counsel investigated her petition, and concluded that there was no reasonable ground to believe that a prohibited personnel practice had taken place; the Special Counsel concluded, rather, that Forthright was not competent to handle the job for which she had been hired. Hence, the matter was not even referred to the MSPB, and the agency's position (which was fully consistent with the statutory scheme) was that the matter was closed.

Forthright then brought a *Bivens* action against her supervisor in federal district court in the District of Columbia, alleging that her retaliatory discharge violated the First Amendment. Her supervisor, represented by the Department of Justice, has moved to dismiss on the ground that no *Bivens* remedy is available in these circumstances. What result?

PROBLEM J

(a) Assume Congress passes a statute (28 U.S.C. § 1371) that provides for federal district court jurisdiction over all tort suits against owners and operators of nuclear power plants, including suits to enjoin the building or operation of such plants. The preamble to the statute makes clear Congress's purpose to protect an asserted federal interest, but the statute does not purport to create any federal rights or defenses against state law tort actions, nor to federalize or displace state tort law. There is a substantial body of other federal laws regulating nuclear power plants, but the courts have held that those laws do not displace state safety regulations.

Citizens Against Nuclear Energy (CANE), a citizens' group, brings suit in a state court of the state of Ames to enjoin construction of a Nuclear Power Plant in Ames. The suit alleges violation of state law as the sole basis for the relief sought. When the defendant, relying on the grant of jurisdiction in § 1371, removes the suit to federal court under 28 U.S.C. § 1441, CANE challenges the constitutionality of § 1371, at least as applied in a case involving only state law issues. What result? (Assume CANE has standing under Article III.)

(b) Assume that the validity of § 1371 (as described in part (a) of this problem) is upheld by the Supreme Court. Does it follow that 28 U.S.C. § 1351(2) is also valid? 28 U.S.C. § 1364?

PROBLEM K

Ames, like many states, has for many years imposed a state income tax based on a
percentage of "adjusted gross income as properly determined under the federal Internal Revenue Code." Pursuant to his authority under state law, the state's Commissioner of Revenue issued a regulation defining "adjusted gross income" for tax purposes. John Taxpayer, a citizen and resident of the state, believed the regulation was inconsistent with the proper federal definition of that phrase. Taxpayer therefore brought an action against the Commissioner in an Ames Federal court, under 28 U.S.C. § 1331, to have the regulation set aside. (Ames law allows such an action for judicial review to be brought in "any court of competent jurisdiction.")

Assume that all the events in this problem occurred before the Supreme Court's Merrell Dow decision, that the action was not barred by the doctrine of sovereign immunity, by the Eleventh Amendment, or by 28 U.S.C. § 1341. Should the Commissioner's motion to dismiss for lack of subject matter jurisdiction have been granted? (Consider the relevance of Standard Oil v. Johnson, H&W 521-23.)

PROBLEM L

Claiming that one John Neuman owes the state of Ames $150,000 in back taxes, officers of the Ames Superior Court, acting pursuant to state law and a state court order that had been obtained ex parte by the State Department of Revenue, seize Neuman’s Yacht (“The 501(c)(3)”). The yacht is then turned over to the Ames Department of Revenue, and the Department schedules an auction of the yacht in order to use the proceeds to settle the state’s claim against Neuman. Before the auction is held, Neuman brings a federal court action (under 42 U.S.C. § 1983) against the state officials who seized the yacht, and against the Ames Department of Revenue and its Commissioner, to compel its return. He alleges that the yacht was seized without prior notice and opportunity to be heard and thus in violation of his constitutional right to due process of law.

All defendants move to dismiss the action - the court officials who seized the yacht on the ground that since they no longer have custody or control of the yacht, they are incapable of giving the requested relief; the remaining defendants on the ground of immunity under the Eleventh Amendment. How should the motion be decided with respect to each of the defendants?

PROBLEM M

Assume that in 2002, Congress amends the relevant provisions of the Civil Rights statutes prohibiting discrimination by any private or public entity in the operation of any hotel, restaurant, means of transportation, etc, available to the public to add the following language: “No State or State entity shall operate any means of public transportation engaged in or affecting interstate commerce unless it first waives any immunity from suit in federal court brought by any person injured by any violation of this Act. Continued operation of any such means of transportation shall be conclusively presumed to constitute such a waiver.”
After the enactment of this statute, James Brown, a black employee of the Ames Railroad Company (a railroad owned and operated by the state of Ames that was established in 1990 and that is engaged in activities affecting interstate commerce) sues the Company for racial discrimination and alleges that the denial was based on his race. His complaint does not allege intentional discrimination but rather alleges discrimination on the basis of statistical evidence showing a gross disproportion between the percentage of black employees promoted over a certain period (up to the present) and the percentage of white employees given comparable promotions. (The latter figure is much higher than the former.)

At trial on the merits, the court rules that Brown’s statistical evidence is sufficient to shift to the defendant the burden of going forward with proof showing a basis for the disparity other than race. Defendant introduces no evidence, and the judge, acting on motion by plaintiff, enters judgment for the plaintiff as a matter of law (i.e., a “directed verdict”). Defendant now appeals, raising for the first time a claim of sovereign immunity (and appealing on no other ground). In the appeals briefs, state legislative records are cited showing that after the 2002 amendment, the question whether the state should take any action with respect to the railroad was raised by a bill consenting to suit in accordance with the federal amendment, but the bill was never reported out of committee. How should the appellate court rule?

PROBLEM N

After the Alden trilogy and other cases discussed in the materials, a congressional committee decides to hold hearings to determine what means, if any, are available (either under present law or under amendment(s) to present law) to render state governments (and their agencies) liable in damages for copyright or patent infringement. The committee is open to any and all suggestions, and is interested in both the constitutionality and the practical aspects of any means that are suggested.

What approaches should be brought to the committee’s attention? What are the virtues and/or drawbacks of those proposals?

PROBLEM O

While preparing the prosecution's case against Perry Mason for the murder of Paul Drake, Dorsen County prosecutor Edda Burger went to interview Della Street, Mason's longtime secretary. (The Dorsen County District Attorney spends all of his time holding press conferences and running for re-election; insiders would agree that Burger, who is chief of the criminal division of the office, is de facto in charge of all criminal matters.) Burger was accompanied by a Dorsen County deputy sheriff, Arthur Tragg.

Just before they entered the room with Street, Burger inquired of Tragg whether he was carrying a gun, as required by Dorsen police regulations. "I think she [Street] may be capable of
desperate action," Burger said. During the interview, Street repeatedly claimed that she had been with Mason in another city on the night of Drake's death. When Burger's questioning grew hostile, Street coldly announced that "I don't need to take this from you." Then, losing her composure, Street jumped to her feet and rushed for the door. "Stop her," Burger shouted. At this command, Sheriff Tragg pulled his gun from a shoulder holster and shot Street in the shoulder.

After this incident, Street brings an action for damages under 42 U.S.C. § 1983 against the impecunious Tragg, prosecutor Burger, and Dorsen County. On what basis, if any, may each of the defendants be held liable?

PROBLEM P

Suppose that officers of the State Highway Patrol frequently stop cars driven late at night by black youths in white neighborhoods. Your client, Jenkins, who is black, works the night shift, and has been stopped six times in the past three months, in each case, he says, without any reason for a stop other than his race. He wishes to bring suit to obtain an injunction against repetition of the stops; for damages for past stops; and for attorney's fees. Where should he sue? Whom should he sue? What relief will he get if his allegations are proved?

PROBLEM Q

In 2002, the city of Chatterly enacted an ordinance prohibiting the operation of any "adult motion picture theater" within 1000 feet of any residential dwelling. (The ordinance provides criminal penalties for violation.) At the time, no theater showed such films.

On March 16, 2003, Fred Freeloader purchased an existing theater in Chatterly (within 350 feet of private homes) with the purpose of catering to the students at Chatterly State College with a mixture of fare. Some of the films he was planning to exhibit included sexually explicit scenes. Some two weeks earlier, on March 1, 2003, the city attorney had filed a criminal information against the Chatterly State College Film Society for having exhibited a sexually explicit film on the college campus. She announced at the time that "no one -- and surely not students -- will be allowed to violate the ordinance."

On March 23, Freeloader filed a federal court action against the city attorney under section 1983, seeking declaratory and injunctive relief against enforcement of the ordinance on the ground that it violated the First Amendment That same day, Freeloader filed a motion for a preliminary injunction, alleging that he would suffer irreparable damage without immediate relief because in a college town the months of September and October are far and away the most profitable for movie theaters. On March 25, the federal district judge issued an order requiring that the parties brief the motion by April 6, and scheduling a hearing on the motion for April 9.

On March 30, the city attorney filed suit in state court against Freeloader and several
other operators of movie houses, seeking a declaratory judgment that the ordinance was constitutional. On April 2, the city attorney filed a motion in federal court seeking to dismiss or stay the § 1983 action in light of the pending state court suit.

(a) Should the city attorney's motion to stay or dismiss Freeloader's section 1983 action be granted

(b) Would it matter if just before these motions were ruled on, the city attorney filed a criminal information in state court charging Freeloader with having violated the ordinance on the evening of April 6 by showing the movie "Gidget Goes to Seed"?